No. 90-1550

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

ANNIE LEE HUDSON, K. CELESTE CAMPBELL, ESTERLENE HOLMES, EDNA ROSE MCCOY, DEBRA ANN PETITAN, WALTER A. SHERRILL, and BEVERLY F. UNDERWOOD,

Petitioners,

v.

CHICAGO TEACHERS UNION, LOCAL NO. 1., ROBERT HEALEY, JACQUELINE B. VAUGHN, ROCHELLE D. HART, THOMAS H. REECE, GLENDIS HAMBRICK, Individually and as Officers of the Chicago Teachers Union, BOARD OF EDUCATION OF THE CITY OF CHICAGO, ILLINOIS, RAOUL VILLALOBOS, MARTHA JANTHO, THOMAS CORCORAN, BETTY BONOW, SOL BRANDZEL, CLARK BURRUS, LEON JACKSON, ROSE MARY JANUS, DR. WILFRED REID, MYRNA SALAZAR, DR. LUIS SALCES, and VIOLA THOMAS, Individually and as Officers and Members of the Board of Education of the City of Chicago, Illinois,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF IN OPPOSITION

KEVIN CONNELLY
350 North LaSalle Street
Chicago, Illinois 60610
(312) 321-1969
(Counsel of Record for the Board of Education of the City of Chicago Respondents)

CHARLES ORLOVE
201 North Wells Street
Chicago, Illinois 60606

LAWRENCE A. POLTROCK
125 South Wacker Drive
Chicago, Illinois 60606

LAURENCE GOLD
815 16th Street, N.W.
Washington, D.C. 20006
(202) 637-5390
(Counsel of Record for the Chicago Teachers Union Respondents)

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTION PRESENTED

Whether the district court and the court of appeals properly determined that the Union's extensive fair share fee notice (set out at Pet. App. 52a-110a) provides "an adequate explanation of the basis for the fee" as required in *Chicago Teachers Union v. Hudson*, 476 U.S. 292, 310 (1986).

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BRIEF IN OPPOSITION

The opinions below, the basis of this Court's jurisdiction, and the constitutional and statutory provisions involved are set out at pp. 1, 2 and 111a-112a of the petition for a writ of *certiorari* and the appendix thereto (hereinafter "Pet. ——" and "Pet. App. ——").

STATEMENT

In *Chicago Teachers Union v. Hudson*, 476 U.S. 292 (1986), this Court set three "constitutional requirements for the Union's collection of agency fees" from public employees:

> [i] an adequate explanation of the basis for the fee, [ii] a reasonably prompt opportunity to challenge the amount of the fee before an impartial decisionmaker, and [iii] an escrow for the amount reasonably in dispute while such challenges are pending. [*Id.* at 310.]

These requirements reflect the Court's recognition that the "government interest in labor peace is strong enough to support an 'agency shop' notwithstanding its limited infringement on nonunion employees' constitutional rights" (*id.* at 302-303) and are designed "to minimize the infringement" (*id.* at 303) on those rights.

After this Court's *Hudson* decision, as the court of appeals explained, the Chicago Teachers Union ("CTU" or the "Union") "attempted to revise its fair share notice procedure to comply with *Hudson*'s mandate." Pet. App. 5a. The Union's "revised procedure was implemented for the 1986-87 school year (FSN-2)" and its legal adequacy was challenged by petitioners in the district court on remand. *Id.*[1] "While the adequacy of FSN-2 was before the district court, the parties agreed that all fair share fees collected by the CTU would be deposited with the clerk of the court . . ." pursuant to Rule 67, F.R.C.P. *Id.* Before the district court ruled on the adequacy of FSN-2, "the 1987-88 school year began, and the CTU had further refined its fair share notice procedure (FSN-3)." *Id.* "By agreement of the parties, the lawsuit

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[1] The court below used the initials "FSN" to designate the CTU's Fair Share Fee Notice. FSN-1 refers to the original notice; FSN-2 to the 1986-1987 school year notice; and FSN-3 to the 1987-1988 school year notice.

focused on the adequacy of FSN-3 rather than FSN-2." *Id.*

The district court found that the CTU's 1987-1988 school year fair share fee notice (FSN-3) met *Hudson*'s "adequate explanation of the basis of the fee" requirement:

> [T]he CTU's 1987-88 notice discloses to nonunion employees the calculations and assumptions underlying the fair share fee. This notice includes all of the features required by the Supreme Court in *Hudson*. For instance, the notice breaks down the fee into its component parts, listing the CTU's major categories of expenses. The notice also reveals the CTU's method of expenses. The notice also reveals the CTU's method for calculating the fee, including the CTU's definition of collective bargaining. Furthermore, an independent auditor has verified that the CTU actually made the expenditures described in the notice. This verification incorporated the best format and the highest level of service offered by the accounting profession. Finally, and most importantly, the notice is serving its intended purpose [of] . . . providing potential objectors with sufficient information to gauge the propriety of the fee. [Pet. App. 38a.]

And, "[a]fter reviewing the FSN-3, [the court of appeals] conclude[d] that the district court properly found that it was constitutionally adequate under *Hudson* and in accordance with [that court's] prior precedents because it provides sufficient information to enable the plaintiffs 'to decide whether there is any reason to mount a challenge.' " Pet. App. 21a, quoting *Gilpin v. AFSCME*, 875 F.2d 1310, 1316 (7th Cir.), *cert. denied*, —— U.S. ——, 110 S.Ct. 278 (1989).

Circuit Judge Ripple's opinion (joined by Circuit Judge Coffey and Senior District Judge Reynolds), moreover, cogently explains how FSN-3 meets both the letter and the spirit of this Court's *Hudson* decision.

First, said the court of appeals, FSN-3 "informs nonmember employees that their fair share fee reflects the nonmembers' proportionate share of the costs of services rendered by the CTU necessarily and reasonably incurred for the purpose of performing collective bargaining activities." Pet. App. 19a.[2]

> The FSN-3 identifies and defines two categories: chargeable expenses and non-chargeable expenses. Each category is defined and further broken down to specific items of expenditures. The non-chargeable expenses category follows a similar detailed breakdown. [Pet. App. 19a (footnote omitted).]

Second, FSN-3 contains reports from independent certified public accountants allocating the Union's expenditures into the chargeable and nonchargeable categories:

> The FSN-3 contains the CTU's audit report prepared by its independent certified public accountant. The CTU's accountant issued a "special report," which, the CTU informs us and plaintiffs do not contest, is the highest level of review and the best format for presenting the results of such a review. The report allocates expenses in twenty-two line items between those that are chargeable and those that are nonchargeable and provides a dollar amount for each category. The report further provides a detailed explanation of the techniques employed in producing the report. The FSN-3 also provides similar audit reports for the state and national unions affiliated with the CTU. [Pet. App. 19a-20a (footnotes omitted).]

Third, to assist the nonmember in understanding the voluminous accounting material contained in FSN-3, the notice contains "a two page summary sheet that gives an

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[2] FSN-3 is reproduced in its entirety at Pet. App. 52a-110a. In its original format, the notice comprised 39 pages and was color-coded for the convenience of readers.

overview of how the accounting reports were translated into calculation of the fair share fee." Pet. App. 20a.

> The summary breaks down the CTU's expenditures into thirteen functional categories, providing the percentage of total expenditures within each category. Twelve of the categories are treated as chargeable in calculating the fair share fee, and the thirteenth category groups all nonchargeable expenditures. [Pet. App. 20a (footnote omitted).]

Fourth, the notice concludes by "detail[ing] the arbitration procedure available to employees who wish to challenge the fee, and the rights of employees in that procedure." Pet. App. 20a.

> [FSN-3] explains that an employee may initiate a challenge by stating an objection in a letter to the CTU and that the CTU will have the burden of proving that the fee amount is pursuant to applicable federal and state law in any arbitration proceeding. Finally, the CTU offers to make available to a challenger any relevant books and records prior to and in preparation for the arbitration proceeding. [Pet. App. 20a-21a (footnote omitted).]

Finally, the court of appeals reviewed "other cases in which courts have found the notice provisions inadequate under *Hudson*" and determined that "CTU's FSN-3 suffers from none of the deficiencies identified in those cases." Pet. App. 21a; footnote omitted.

On the basis of all of the foregoing, the court of appeals held that the Union's 1987-1988 school year fair share fee notice complies with *Hudson*.

ARGUMENT

At this juncture, as the court of appeals emphasized, this case "focuses on the first requirement" for a union's collection of agency fees established in *Chicago Teachers Union v. Hudson*, 475 U.S. 292 (1986): that the union must provide nonmember fee payers "an adequate explanation of the basis for the fee." Pet. App. 15a quoting 475 U.S. at 310. The court below carefully reviewed the Union's comprehensive notice and explained at length why that notice meets *Hudson*'s "adequate explanation" requirement. Pet. App. 17a-21a. See also pp. 3-5 *supra*.

The court of appeals' understanding of *Hudson* is, as we show below, correct beyond peradventure. That court's application of *Hudson*'s teachings to the particular facts of this case is equally unassailable. And, the petition's claim of a conflict in the lower courts as to the meaning and proper application of the *Hudson*'s "adequate explanation" requirement is totally without substance. The *certiorari* petition should therefore be denied.

1. *Hudson* explains that the purpose of requiring "an adequate explanation of the basis for the fee" is to insure that the nonmember will "be given sufficient information to gauge the propriety of the union's fee." 475 U.S. at 306. To this end, the explanation of the fee must "identify[] the expenditures for collective bargaining and contract administration that [are] provided for the benefit of nonmembers as well as members—and for which nonmembers as well as members can fairly be charged a fee." *Id.* at 306-307. *Hudson* also specifies how a union is to identify these expenditures in the fee notice:

> The Union need not provide nonmembers with an exhaustive and detailed list of all its expenditures, but adequate disclosure surely would include the major categories of expenses, as well as verification by an independent auditor. [*Id.* at 307 n.18.]

In the court below and in their petition, the petitioners' attacks on the Union's fair share fee notice

> have little to do with the constitutional *adequacy* of FSN-3. Instead, the [petitioners] attack how the CTU *calculated* the fair share fee . . . . Taken in its entirety, plaintiffs' challenge asserts that a prior hearing and prior judicial determination of the correctness of a fair share fee is a precondition to the collection of the fee. [Pet. App. 15a-16a (emphasis in original).]

We cannot improve on the court of appeals clear and acute rejection of the plaintiffs' position in this regard and we therefore rest on that court's reasoning:

> Were we to accept plaintiffs' invitation and provide a hearing and judicial determination of the correctness of the fee, we would in effect render redundant and irrelevant the requirements that an impartial decisionmaker hear the dispute and that an escrow account be provided for the amounts reasonably in dispute while the challenge is pending. The proper procedure employs each of the three prerequisites identified by the Supreme Court: the fair share notice provides the basis for a challenge to the fair share fee assessment; the impartial decisionmaker determines the correctness of the fee amount; and the escrow protects the challenger's funds pending such a decision. The Supreme Court's prerequisites presuppose that a fee has already been collected and that the challenge will be decided after the fee has been collected. The federal court does not, at this stage, review the fee calculation. [Pet. App. 16a-17a].[3]

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[3] The court of appeals was careful to add that full federal court review of an objecting fee payer's challenge to a union's fee calculation is also available:

> Of course the impartial decisionmaker's determination is not the final word on the challenge. *If* the decision is adverse to the plaintiffs, they may *subsequently* seek review by a federal court. [Pet. App. 17a (emphasis in original).]

For an example of such a review see, e.g., *Lehnert v. Ferris Faculty Ass'n*, —— U.S. ——, Slip Op. 4 (No. 89-1217) (May 30, 1991)

The court of appeals, in short, quite properly rejected petitioners' invitation to collapse the tripartite notice/arbitration/escrow procedure that this Court established in *Hudson* into a pre-collection federal court "determination of the correctness of a fair share fee" (Pet. App. 16a), that preempts two of the three *Hudson* requirements.[4]

(after 12 day bench trial, district court determined that some expenditures were chargeable, that some were nonchargeable, and that the union had failed to meet its burden of proof with respect to other expenditures).

A separate strand of the *Lehnert* litigation involved a challenge to the *Hudson* procedures adopted by the Ferris Faculty Association. The lower courts upheld those procedures and this Court denied the fee payers' petition for a writ of *certiorari* from that decision. *Lehnert v. Ferris Faculty Ass'n*, 893 F.2d 111 (6th Cir. 1989), *cert. denied*, 110 S.Ct. 2586 (1990). It is this latter aspect of *Lehnert* that is parallel to the instant case.

[4] Petitioners now claim that the lower court also interposed an exhaustion bar on their right to bring a federal court suit at this time. Pet. 25. But exhaustion of the Union's internal procedures as a precondition to suit was never at issue. It was understood by all concerned that the petitioners never initiated, much less exhausted, the available arbitration procedure. The petitioners were not, however, foreclosed from litigating on that basis. Rather as the foregoing quotation shows, the petitioners were permitted to pursue their claims which were rejected on the merits as inconsistent with *Hudson*.

Indeed, the limitation of which the petitioners complain is self-imposed. On remand from this Court, they "amended their complaint to focus exclusively on procedural due process" (Pet. at 3); *viz.*, on the *adequacy* of the notice. The *accuracy* or legitimacy of the specific dollar changes itemized in the union's notice is a separate issue. This Court in *Hudson* recognized precisely that distinction (475 U.S. at 304, n. 13), as did petitioners, who—until now—had repeatedly described their suit as a "challenge . . . to the procedures, not the expenditures." Thus, the record here did not put exhaustion at issue and it is, accordingly, not properly raised before this Court. See *Delta Air Lines v. August*, 450 U.S. 346, 362 (1981) and *Adickes v. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970).

2. The court of appeals, moreover, carefully attended to this Court's guidance regarding the *Hudson* "limited notice requirement" (475 U.S. at 306, n. 17)—as well as to *Hudson*'s caution that "'[a]bsolute precision' in the calculation of the charge to nonmembers cannot be 'expected or required,'" (*id.* at 307, n. 18)—in determining whether the particular fair share fee explanation challenged here is adequate.

a. As the opinions below explain, FSN-3 sets out the types of expenditures that are classified as chargeable and the types classified as nonchargeable; shows the allocation of union expenditures into these two categories in unqualified audit reports issued by independent CPAs; explains how the CPAs audited this allocation; and offers nonmembers a full hearing on any challenge to the fee calculation. Pet. App. 18a-21a & 38a. This notice is certainly not open to a charge of "[l]eaving the nonunion employees in the dark about the source of the figure for the agency fee. . . ." 475 U.S. at 306. Indeed, as the court of appeals has aptly noted, a notice that provided more information would risk overwhelming the nonmember in details and being challenged on the ground that it is "as long and complicated as an SEC prospectus." *Gilpin v. AFSCME*, *supra*, 875 F.2d at 1316.

b. Both in the court below and in this Court, the petitioners claim that FSN-3 is not "a legally valid and scientifically rational notice." Pet. 26 (emphasis omitted). Significantly, the petitioners do *not* deny that FSN-3 faithfully reflects how CTU calculated the agency fee. Rather, their objection is that the calculation set forth in the notice is itself "patently irrational." Pet. 29. For the reasons the court of appeals stated, this line of attack goes wide of the target. *See.* pp. 6-7, *supra.* Just as "the Fourteenth Amendment does not enact Herbert Spencer's Social Statics" (*Lochner v. N.Y.*, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting), that Amendment does not command adherence to the accounting or eco-

nomic theories of petitioners' less-famed experts. Compare, Pet. 12, n. 34.[5]

c. It is also very much to the point that, each of the petitioners' objections to the CTU's calculation of the agency fee rest on the information provided by the Union's fair share fee notice.

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[5] Indeed, if CTU's method of calculating the agency fee is, as the petitioners charge, "patently irrational", the Union has good company in its irrational ways, namely this Court, the Illinois Educational Labor Relations Board, and the American Institute of Certified Public Accountants.

First, the Union's definition of chargeable expenditures comports with the "germane to collective bargaining" standard established by this Court's decisions. *See Ellis v. Railway Clerks*, 466 U.S. 435. 456 (1984).

Second, in each particular challenged by the petitioners, the Union's classification of expenditures as chargeable is in accord with the decisions of the Illinois Educational Labor Relations Board, the administrative agency the State has designated to superintend the fair share fee system. *See Lake Cty. Fed. of Teachers*, 4 PERI ¶ 1096, IX 391-392 and 406 (1988).

Third, by basing the agency fee on normal union dues reduced by the percentage of nonchargeable expenditures, CTU is simply following this Court's repeated statement that the agency fees to be paid by objecting nonmembers are to be set by reducing normal union dues by the "proportion that union political expenditures bear to total union expenditures. . . ." *Railway Clerks v. Allen*, 373 U.S. 113, 122 (1963). *See also, Abood v. Detroit Board of Education*, 431 U.S. 209, 240 (1977); *Chicago Teachers Union v. Hudson, supra*, 475 U.S. at 307 n. 18.

Finally, the "special report" issued by the independent certified public accountants on CTU's allocation of expenditures represents, in the words of the court of appeals, "the highest level of review and the best format for presenting the results of such a review" known to the accounting profession. Pet. App. 19a.

Calculating the initial fee on the basis of a definition of what is chargeable grounded in the latest precedents of the state agency charged with administering the state's agency fee law, according to a formula suggested by this Court, and in compliance with the "highest level of review" known to current accounting practice is the very opposite of "patent[] irrational[ity]."

The four types of chargeable expenditures, whose scope is challenged by the petitioners, are clearly spelled out in the definition of chargeable expenditures given in the accountants' report. Pet. App. 68a-70a; *see also id.* at 83a-84a. The fact that agency fees equal the amount of normal Union dues multiplied by the chargeable percentage of Union expenditures is clearly explained in a section of the notice entitled, "the Basis of the 1987-88 Fair Share Fee." Pet. App. 60a. Furthermore, at the outset the accountants' report states that it is based on an "examination . . . made in accordance with generally accepted auditing standards, and, accordingly, included such tests of the accounting records and such other auditing procedures as we considered necessary in the circumstances." Pet. App. 63a. That report goes on to summarize what those tests and procedures were, including the procedures employed to allocate salary-related expenditures, which the petitioners single out for criticism. Pet. App. 67a-72a.

Thus, from the petitioners' objections alone, it is evident that FSN-3 fills its office of providing nonmembers "sufficient information to gauge the propriety of the union's fee." 475 U.S. at 306.[6]

3. Petitioners' obligatory obeisance to a "conflict" in the lower courts is an empty gesture. No court has accepted the invitation made by the petitioners here to

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[6] Petitioners' suggestion that *Hudson's* tripartite procedure is inherently unworkable is wholly unfounded. *Hudson* does not simply require unions to prepare an informative, verified fair share fee notice but also a reasonably prompt opportunity to challenge the fee in which the nonmember employee need only state his objection and the union bears the burden of proving the legal and factual validity of the fee in every respect. Not only would it be entirely counterproductive for a union faced with that prospect to issue a "purported 'notice' that apes the form, but lacks the informational substance *Hudson* demands" (Pet. 23) but also, in practice, "unions seeking to comply with the post-*Hudson* administrative and judicial decisions are erring on the side of caution," (Matsis, "Procedural Rights of Fair Share Objectors After *Hudson* and *Beck*," 6 The Labor Lawyer 251, 293 (1990)).

"micro-manage the fee calculation" in the course of determining whether *Hudson*'s requirement for an "adequate explanation of the basis for the fee" has been met. Pet. App. 16a. The Fourth Circuit's recent decision in *Dashiell v. Montgomery County*, 925 F.2d 750, 756-757 (4th Cir. 1991), summarizes the uniform view in the courts of appeals:

> [T]he First Amendment, as interpreted by *Hudson*, requires only that the union disclose as part of its initial explanation to employees (1) such information that reveals to the employees major description categories of expenses which will be assessed against the employers; (2) the component dollar amounts of each category so chargeable; and (3) information to show that the financial figures have been verified by an independent auditor. No more could practically be required at this stage. We, therefore, join the decisions in the Second, Sixth, and Seventh Circuit, which reach the same conclusion.

As *Dashiell v. Montgomery County* recognizes, the two Sixth Circuit cases cited by the petitioners (Pet. i & 16), parallel rather than diverge from the Seventh Circuit cases. In *Tierney v. City of Toledo*, 917 F.2d 927, 929 (6th Cir. 1990), the Sixth Circuit stated:

> [I]t is not our function here to render a final accounting or strike the ultimate balance but rather to ensure that the procedures by which these conflicts are resolved sufficiently comply with Supreme Court mandates to allow the controversy to go to meaningful arbitration.

In an earlier *Tierney* opinion, the Sixth Circuit stated that the categorization of particular expenditures as chargeable or nonchargeable is *not* an issue to be addressed in ruling on the adequacy of the union's objection procedures:

> It is not necessary for us to anticipate the categorization of any potential expense, for we see this as an administrative determination by the independent

decisionmaker, under the law developing in cases such as *Ellis v. Railway Clerks*, 466 U.S. 435 (1984). [*Tierney v. City of Toledo*, 824 F.2d 1497, 1504-05 (6th Cir. 1987).]

The other three decisions cited by the petitioners as conflicting with the decision below—*Schneider v. Colegio de Abodagos de Puerto Rico*, 917 F.2d 620 (1st Cir. 1990); *Harrison v. Massachusetts Society of Professors*, 405 Mass 56, 537 N.E. 2d 1237 (1989); *Gibney v. Toledo Board of Education*, 40 Ohio St. 3d 152, 532 N.E. 2d 1300 (1988)—are not remotely in point. None of these decisions examine a fair share fee notice to determine if the notice provides "an adequate explanation of the basis for the fee." Pet. App. 15a. And none "pass on the legality and accuracy of every element of the fee calculation," Pet. App. 16a, as the petitioners would require whenever a court is called upon to determine the adequacy of a fair share fee notice. Thus, the conflict asserted in the petition (Pet. i. & 16), simply does not exist.

CONCLUSION

For the above stated reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

KEVIN CONNELLY
350 North LaSalle Street
Chicago, Illinois 60610
(312) 321-1969
(Counsel of Record for the Board of Education of the City of Chicago Respondents)

CHARLES ORLOVE
201 North Wells Street
Chicago, Illinois 60606

LAWRENCE A. POLTROCK
125 South Wacker Drive
Chicago, Illinois 60606

LAURENCE GOLD
815 16th Street, N.W.
Washington, D.C. 20006
(202) 637-5390
(Counsel of Record for the Chicago Teachers Union Respondents)